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The Pittsburg & Midway Coal Mining Company and United Mine Workers of America. Cases 27–CA–19566–1 and 27–CA–19567–1

September 29, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

Upon a charge and an amended charge filed April 6 and 7, 2005, by United Mine Workers of America, the General Counsel of the National Labor Relations Board issued an order consolidating cases, a consolidated complaint, and a notice of hearing on October 28, 2005, alleging that The Pittsburg & Midway Coal Mining Company had violated Section 8(a)(3), (5), and (1) of the Act. Specifically, the consolidated complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by modifying the terms of the employees' bonus plan in response to the Union's exercise of its contractual right to call "Memorial Period" work stoppages at the North River Mine and to discourage employees from engaging in future such work stoppages. The complaint further alleges that because the modification of the bonus plan adversely affected the Union's contractual right to call memorial days at the Respondent's North River, McKinley, Kemmerer, and York Mines, the modification also violated Section 8(a)(5) and (1).

On August 18, 2006, the Respondent, the Union, and the General Counsel filed with the Board a joint stipulation of facts and a motion to transfer this proceeding to the Board. The parties waived a hearing before an administrative law judge and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and a Decision and Order, based on a record consisting of the charge, the order consolidating cases, the consolidated complaint, the notice of hearing, the answers to the complaint, the orders postponing the hearing, the stipulated facts and exhibits, and the parties' statement of issues presented.

On January 16, 2007, the Board approved the stipulation of facts and granted the motion. Thereafter, the General Counsel, the Respondent, and the Union filed briefs, and the General Counsel and the Union filed reply briefs.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Missouri corporation with a principal office and place of business in Englewood, Colorado. At all relevant times, the Respondent was engaged in the business of operating coal mines at the following locations: the North River Mine in Alabama, the McKinley Mine and the York Canyon Mine in New Mexico, and the Kemmerer Mine in Wyoming. In the course and conduct of its coal mining business, the Respondent annually purchases and receives at its Kemmerer Mine goods, materials, and services valued in excess of \$50,000 directly from points and places outside the State of Wyoming. The Respondent is a whollyowned indirect subsidiary of Chevron Corporation, a multinational publicly-traded company in the energy industry.

The parties stipulated, and we find, that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

At all material times, the Union represented the Respondent's employees at the four mines, which are situated in two of the Union's districts: District 20 (North River Mine) and District 22 (Kemmerer Mine, McKinley Mine, and the now-closed York Canyon Mine). Since 1978, the Respondent and the Union have operated under successive collective-bargaining agreements containing the following "Memorial Periods" clause:

The International Union, United Mine Workers of America, may designate memorial periods not exceeding a total of ten (10) days during the term of this agreement *at any mine* or operation provided it shall give reasonable notice to the Employer. (Emphasis added.)

A memorial period or day is a work stoppage that results in the cessation of operations at the mine(s) at which it is called. Arbitrators' decisions included in the parties' stipulation indicate that the Union has called memorial days to commemorate mine disasters, to allow employees to take time off for union business, to support the Union's position in local disputes, and even to permit employees to take a day off at the start of the hunting season, among other reasons.

¹ The Board rejected the Respondent's answering brief as untimely.

Since 1995, the Respondent and the Union have also been parties to a letter of agreement (LOA), separate from the collective-bargaining agreement, under which union-represented employees participate in Chevron Success Sharing (CSS or bonus plan). The letter of agreement states in pertinent part:

[The Respondent] may, without prior notice, modify, amend or terminate CSS, but it is agreed that should any changes be made, said changes shall be communicated to the Union as soon as practicable.

... it is understood and agreed that any dispute as to the interpretation or application of CSS or this letter of agreement is not subject to the grievance and arbitration provisions of the collective bargaining agreements of the Parties, and it is understood that the Union may terminate this agreement if the Union disagrees with any [Respondent] decision with regard to CSS.

During negotiations over the LOA, in response to the Union's objection, the Respondent removed proposed language that would have given the LOA precedence over the collective-bargaining agreement. The stipulated record indicates that the Respondent has modified the plan in certain years to change the percentage of the bonus payout. Additionally, in 2001, it modified the bonus plan to require forfeiture of the bonus by any employees who engage in an unauthorized work stoppage. The Union did not object to any of those modifications.

In 2004, the Union called memorial days at the Respondent's North River Mine on February 26, 27, and 28, and July 19, 21, and 30, in order to place economic pressure on the Respondent with respect to ongoing grievances that were being taken to arbitration. The stipulated record does not reveal the nature of the grievances.

On February 3, 2005, the Respondent notified the Union that it had modified the bonus plan to include a provision requiring employees to forfeit the bonus at any mine at which the Union called a memorial day, if the memorial day was called on less than a districtwide basis. The modification states:

There will be no financial metric pay out at any mine where the UMWA calls a memorial period or day for such mine without having called such a memorial period or day for all of the UMWA represented mines or facilities within the UMWA District in which such mine is located.

The Respondent acknowledges that the provision was added in response to the Union's calling the 6 memorial days at the North River mine during the preceding year.

B. The Parties' Contentions

The General Counsel and the Union contend that the Respondent unlawfully modified the bonus plan in retaliation for the Union and the employees' exercise of their contractual right to call memorial days at individual mines. The General Counsel and the Union also contend that the unilateral modification was unlawful insofar as it was intended to, and would, deter employees from the exercise of their contractually guaranteed right to participate in memorial days. They further argue that the bonus plan modification adversely affected the exercise of the employees' contractual rights, thereby undercutting the Union's status as bargaining representative.

The Respondent contends that its change to the bonus plan was lawful because it acted without antiunion animus and because the Union's work stoppages that triggered the Respondent's change were not protected by the Act.² It further contends that the memorial days that the Union called at the North River Mine constituted economic strikes, and that its modification of the bonus plan was an economic weapon lawfully employed in response. Finally, the Respondent asserts that the 1995 LOA expressly gave it the right to amend or terminate the plan and, therefore, that its 2005 amendment of the plan did not violate the Act.

C. Discussion

The parties stipulated that the alleged 8(a)(3) violation should be analyzed using the Board's *Wright Line* test.³ Having accepted the stipulation, we will use the *Wright Line* framework for our analysis.

To meet his initial burden under *Wright Line*, the General Counsel must show, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor in the employer's decision. *Shearer Foods, Inc.*, 340 NLRB 1093, 1094 (2003); *Manno Electric*, 321 NLRB 278, 280 (1996). Once the General Counsel carries his initial burden, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.

Here, it is undisputed that the employees' memorial day work stoppages were a motivating factor in the Respondent's decision to modify its bonus plan. Therefore, the only question to be decided is whether the employ-

² The Respondent also suggests that the General Counsel's arguments that memorial days are protected activity are beyond the scope of par. 5(b) of the complaint. However, pars. 5(a), (b), and (c) clearly encompass those arguments.

³ Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

ees' participation in the memorial days constituted protected activity under the Act. If the General Counsel establishes that the work stoppages constituted protected conduct, the General Counsel has proved a violation of the Act, absent some other affirmative defense. As discussed below, we find that the General Counsel has established that the work stoppages constituted protected conduct and that the Respondent did not meet its burden of proving its affirmative defenses.

Did the Memorial Periods Constitute Protected Activity under the Act

We begin our analysis with the principle that an employee's exercise of rights provided for in a collectivebargaining agreement constitutes protected activity under the Act. NLRB v. City Disposal Systems, 465 U.S. 822, 831-832 (1984); Rogers Corp., 344 NLRB 504, 513 (2005); Wheeling-Pittsburgh Steel, 241 NLRB 1214, 1221 (1979), enfd. in rel. part 618 F.2d 1009 (3d Cir. 1980). Here, the parties' contract explicitly granted the Union the right to call memorial days and placed only two restrictions on that right: the number of memorial days called could not exceed 10 during the contract period, and the Union was required to provide the Respondent with advance notice. The Union violated neither of those restrictions. It would appear, therefore, that by exercising their right to participate in memorial days in a manner consistent with the contract, the employees were engaging in conduct protected by the Act.

The Respondent nevertheless argues that the Board should find that the work stoppages did not constitute protected conduct and, therefore, that its modification of the bonus plan in response to the stoppages did not violate the Act. Given the General Counsel's showing, the burden of proof shifted to the Respondent to demonstrate that the work stoppages were unprotected. See *Silver State Disposal Service*, 326 NLRB 84, 85–86 (1998).

First, the Respondent asserts that the *Union's* invocation of the memorial day provision is distinct from the exercise of Section 7 rights by employees. Further asserting that Section 7 protects employees and not unions, the Respondent contends that the Union's action in calling memorial days was not protected by the Act. This argument is without merit. Under the contract, the Union, acting as the employees' representative, designates the memorial days and then the employees, exercising their contractual rights, take the memorial days. As the parties stipulated, "the Union may designate 'Memorial Periods' . . . to be taken by employees." Here, moreover, it was the employees at the North River Mine who petitioned the Union's president, Cecil Roberts, to call the memorial days at issue. The Union's contractual right to designate memorial days has no meaning apart from the employees' ability to participate in those memorial days and their participation is the exercise of a Section 7 right.⁴

Next, the Respondent argues that the memorial days did not constitute protected conduct because they were called in violation of the parties' implied no-strike agreement. Citing *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), the Respondent asserts that, because the parties' collective-bargaining agreement contained an arbitration provision, the Union implicitly agreed not to strike over arbitrable matters. As a result, the Respondent further asserts, the memorial days called in support of grievances at the North River Mine were effectively taken in derogation of the collective-bargaining agreement, and therefore, were not protected. For the following reasons, we disagree.

In *Gateway Coal*, the Court considered whether a district court had the authority to enjoin a work stoppage that had been called over a safety concern at a mine. After finding that the safety dispute was arbitrable, the Court concluded that the union was under an implied contractual duty not to strike based on the broad arbitration clause contained in the parties' collective-bargaining agreement. Quoting *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 248 (1970), the Court reasoned, "[A] no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration." *Gateway*, 414 U.S. at 382.

The *Gateway* Court nevertheless recognized that, although "an arbitration agreement is usually linked with a concurrent no-strike obligation, . . . the two issues remain analytically distinct." Id. As the Court concluded:

It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Markets*. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.

Id. Plainly, however, the parties to a contract are free to, "expressly negate" any implied no-strike obligation in whole or in part.

⁴ The Respondent's reliance on language from *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), is misplaced. *Lechmere* involved the question of whether *nonemployee* union organizers had a right of access to employer's private property. Here, by contrast, the employees' exercise of their own contract right—to engage, subject to restrictions, in work stoppages—is the issue.

The question presented here is whether, based on the parties' agreement to arbitrate their disputes, the memorial days called at the North River Mine violated an implied no-strike agreement and, thus, constituted unprotected conduct, or, instead, whether the memorial day provision (at least where the Union satisfies its terms) expressly negated the implied no-strike clause. We find the latter reading of the contract persuasive, and thus conclude that the memorial days remained protected.

Certainly, the parties' collective-bargaining agreement contains an implied no-strike agreement that, under *Gateway Coal*, would generally prohibit work stoppages. The memorial days called at the North River Mine were, by definition, work stoppages. The parties' agreement, however, expressly allowed the Union to call up to 10 memorial day periods during the term of the agreement upon reasonable notice to the Employer. And, on its face, the memorial day provision places no restrictions on the Union's ability to call memorial days for whatever reason it chooses.

Consistent with that reading, the stipulation, as well as the court and arbitration decisions appended as exhibits to the stipulation, 5 show that, historically, the Union has called memorial days for all sorts of reasons, including to allow time off for local officers to attend union conventions, to permit employees (more than an employer would allow) to take advantage of the opening of hunting season, and in support of grievances over safety issues. 6 Indeed, one of the attached court decisions in which the

A memorial period is commonly understood to be a time set aside to observe the memory of a particular event or person, but in recent years, memorial periods under this provision have been used to provide employees with time off work to participate in certain activities deemed important by the International Union, and have also been used to provide a cooling off period in the course of a work stoppage in the coal fields. There is no limitation in the contract which restricts the purpose for which a memorial period may be used. . . . In effect, the memorial period is an authorized stoppage of work which is specifically recognized by the contract. . . .

In another award, the arbitrator stated that the company took the position that "[t]here is no question that the union has a contractual right to call memorial days without giving the company a reason for the call." *United Mine Workers District 17, Local 781 v. Eastern Associated Coal Corp.*, Case 01-17-04-176 (Feb. 28, 2005).

"purpose of the Memorial Periods Clause was addressed" is a United States District Court decision denying a motion for a preliminary injunction barring a local of the Union from calling memorial days to further its position in a dispute over a contractual attendance rule. company argued the stoppages were barred by the implied no-strike clause. The court, relying on Gateway Coal, held that the memorial day clause created an express exception to the implied prohibition because it "gives the Union a unilateral right to call a memorial period . . . as has been shown by the lengthy history of memorial periods inclusion in . . . contracts, case authority and arbitration decisions." The court specifically found that the contractual right to call memorial days "is a bargaining chip that the Union can use in an often 'fractious' relationship that often exists between labor and management in the coal industry."

These stipulated facts clearly show that the "purpose of the Memorial Periods Clause" was not limited to addressing issues other than grievances covered by the contract's arbitration clause. The Respondent makes no attempt to show that the parties had a past practice under which a memorial day could not be called in support of a grievance. And, so far as the record shows, the Respondent never asserted in 2004, when 6 such memorial days were called, that the employees' conduct was unprotected.

In fact, the Respondent's response to the North River Mine memorial day stoppages negates its Gateway Coal argument. The Respondent's amendment of the LOA permitted employees to continue to receive a bonus even if they took a memorial day over an arbitrable grievance so long as they did so districtwide. At the same time, it deprived employees of a bonus based on taking a memorial day on a less than districtwide basis even if it related to a nonabitrable matter (such as the death of a miner). The sanction is thus both under-inclusive and overinclusive in relation to the Respondent's argument. In the absence of evidence or argument that the memorial day provisions of the contract should be construed in a manner other than one consistent with their plain language, i.e., as restricting memorial days only by limiting their number and requiring reasonable notice, we are not willing to interpret the implied no-strike clause so broadly as to overcome the express contract language authorizing these particular work stoppages.

⁵ The stipulation states that "the history and purpose of the Memorial Periods Clause was addressed" in the attached decisions.

⁶ Arch of West Virginia v. Mine Workers Local 5958, Civil Action No. 2:96-2008 (S.D. W.Va. Nov. 25 1996); Eastern Associated Coal Corp., Wells Plant and Mine Workers District 17, Local 781, Case No. 02-17-04-176 (Arb. Kauffman, Feb. 28, 2005); Mine Workers District 23, Local Union 3000 v. Peabody Coal Co. Martwick Mine, Case 88-23-91-72 (Arb. Phelan, Nov. 8, 1991).

The arbitration decision in *Mine Workers District 23, Local Union 3000 v. Peabody Coal Co. Martwick Mine*, Case 88-23-91-72 (Arb. Phelan, Nov. 8, 1991), is particularly instructive. There, the arbitrator stated:

⁷ Arch of West Virginia v. Mine Workers Local Union 5958, C.A. No. 2:96-2008 (S.D.W.Va. Nov. 25, 1996).

Additional Affirmative Defenses

In addition to arguing that the memorial day periods did not constitute protected activity under the Act, the Respondent raises additional affirmative defenses.

First, the Respondent argues that its modification of the bonus plan did not violate the Act because the action was motivated, not by animus, but by a desire to maximize its ability to share profits with employees. In support of this position, it notes that, at the same time the bonus plan was modified in 2005, all employees, including those at the North River Mine, received a 6-percent bonus and that, as a result of the bonus, the North River employees received more than \$720,000.

We find this argument unavailing. Simply put, the Respondent acknowledges modifying the employees' bonus plan, in a restrictive manner, as a result of the North River employees' protected activity. The modifications, in turn, threaten to strip employees of any bonus under the plan if they engage in similar protected activity. The fact that this adverse action was accompanied by a bonus payment is irrelevant. What is significant is the reasonable and foreseeable effect the Respondent's action would have on employees continuing to assert their protected rights. 9

Second, the Respondent argues that the 1995 LOA reserved to it the unfettered right to modify the bonus plan. Although the language of the LOA permitted the Respondent to make changes to the plan over objections by the Union, it does not follow that the Respondent re-

served the right to amend its plan for unlawful reasons. It is well established that a party cannot exercise its contractual rights in violation of the Act. *Reno Hilton Resorts*, 326 NLRB 1421 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999); accord: *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442 (4th Cir. 2002); *NLRB v. Joy Technologies, Inc.*, 990 F.2d 104 (3d Cir. 1993).

Finally, citing *Central Illinois Public Service Co.*, 326 NLRB 928 (1998), request for review denied sub nom. *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), the Respondent asserts that its modification of the bonus plan was the equivalent of locking out striking employees, i.e., battling one economic weapon with another.

Central Illinois involved the legality of an employer's lockout in response to its employees' use of a variety of pressure tactics short of a traditional, open-ended strike during negotiations for a successor collective-bargaining agreement. The Board assumed, without deciding, that the inside game tactics were protected activity and analyzed the facts using the "inherently destructive" test set forth in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). After determining that the lockout was not inherently destructive of important employee rights and that the harm was "comparatively slight," the Board next assessed whether the employer possessed a legitimate business justification for engaging in the lockout. Concluding that the lockout was a legitimate economic weapon employed in response to the Union's tactics in support of its bargaining position, the Board majority declined to find a violation. Central Illinois, 326 NLRB at 929-934.

We decline to consider this argument. The parties jointly moved the Board to decide this case based on a stipulation that included a joint "statement of the issues presented for review." That statement asked the Board to consider only "[w]hether, under *Wright Line*, the Employer violated Sections 8(a)(3) and (1)." In effect, the Respondent is now asking us to apply the alternative *Great Dane* analysis. In our view, the argument is inconsistent with the terms of the stipulation. ¹¹

⁸ Under the bonus policy as it existed prior to the 2005 changes, employees would experience a diminution of their bonus directly proportional to the number of days they ceased work as a result of a memorial period. Under the new policy, employees who take even a single memorial day on a less than districtwide basis forfeit their entire bonus for the year, regardless of the overall profitability of the Respondent or whether the mine where the employees are employed meets its production goals. Not surprisingly, the Union regarded that change as adverse to employees' interests. That the Union did not thereafter call a local memorial day, and employees did not suffer the consequent loss of bonus payments does not, as Respondent argues, compel a dismissal of the complaint. It is long settled that actual loss is not necessary to establish a violation. See e.g., Ford Motor Co., 131 NLRB 1462, 1487 (1961). Indeed, here, the lack of loss may speak to the chilling effect the Respondent's bonus change had on employees' exercise of their Sec. 7 rights.

⁹ Accepting the Respondent's argument would permit employers to nullify the right to strike contained in Sec. 7 of the Act and expressly preserved in Sec. 13. An employer may believe that strikes cost it money, may believe that threatening employees with adverse economic action if they strike will increase its revenue, and may even intend to share any increased revenue with its employees, but the Act rests on a congressional judgment that it is up to employees and not their employer to decide when it is in their interest to exercise the right to strike and the Act makes it an unfair labor practice for employers to coerce employees in the exercise of their rights, as the change in the bonus plan plainly did here.

The tactics included refusing to work voluntary overtime, presenting grievances en masse, and parking company vehicles in the evenings in a manner making it more difficult for the employer to respond to after-hour service emergencies.

¹¹ Even if we had been properly presented with this argument, we would find it baseless. An employer can, under certain circumstances, lockout all its employees as a defense against certain forms of protected activity, see, e.g., *International Shoe Co.*, 93 NLRB 907 (1951), and cases cited in *American Ship Building*, 380 U.S. 300, 307 (1965), and even, under appropriate circumstances, lockout all its employees in order to pressure them to come to terms on an agreement. Id. at 318. But what an employer cannot do is selectively lockout or otherwise punish only those employees who engage in protected conduct. See,

On the basis of all of the foregoing, we find that the Respondent violated Section 8(a)(3) and (1) by modifying its bonus plan in response to its employees' exercise of a protected, contractual right. Having so found, we find it unnecessary to decide whether the same conduct also violated Section 8(a)(5) because the remedy would not be substantially different.

CONCLUSIONS OF LAW

- 1. The Respondent Pittsburg & Midway Coal Mining Company is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. United Mine Workers Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3.(a) The following employees of the Respondent who are employed at the Respondent's North River Mine, herein called the North River Mine unit, constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

All classified employees engaged in the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads and work of the type customarily related to all of the above; but excluding coal inspectors, weigh bosses where employees are paid by the ton, watchmen, clerks, engineering and technical forces working at or from a district or local mine office, essential supervisors such as mine foremen or assistant mine foremen who, in the usual performance of their duties may make examinations for gas as prescribed by law and such other supervisors as are in charge of any class of labor inside or outside the mines and who perform no production work.

- (b) Since 1988 and at all material times, the Union, by virtue of Section 9(a) of the Act, has been the designated exclusive collective-bargaining representative of the North River Mine unit.
- 4.(a) The following employees of the Respondent who are employed at the Respondent's Kemmerer Mine, herein called the Kemmerer Mine unit, constitute a unit

e.g., Schenk Packing Co., 301 NLRB 487 (1991). Such a selective lockout was not in any way upheld in Central Illinois and it is precisely such a selective sanction that is at issue here. Central Illinois simply does not provide the form of broad immunity for economic retaliation or the threat of such retaliation against employees who engage in protected activity of the form sought by the Respondent in this case.

appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All classified employees engaged in the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal in and around the mine to a screening, crushing, washing or other preparation facility, or other mine-related operation, repair and maintenance work normally performed at the mine site or at a central shop of the Employer, maintenance of mine roads, rough grading in mine reclamation work and work customarily related to all of the above; but excluding coal inspectors, weigh bosses where employees are paid by the ton, watchmen, clerks, engineering and technical forces working at or from a district or local mine office, essential supervisors such as mine foremen or assistant mine foremen who, in the usual performance of their duties may make examinations for gas as prescribed by law and such other supervisors as are in charge of any class of labor inside or outside the mines and who perform no production work.

- (b) Since 1988 and at all material times, the Union, by virtue of Section 9(a) of the Act, has been the designated exclusive collective-bargaining representative of the Kemmerer Mine unit.
- 5.(a) The following employees of the Respondent who are employed at the Respondent's McKinley Mine, herein called the McKinley Mine unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All classified employees engaged in the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal in and around the mine and to a screening, crushing, washing or other preparation facility, or other mine-related operation (except by waterway or rail not owned by P&M) and maintenance of gob piles and mine roads, and work customarily related to all of the above; but excluding watchmen, clerks, engineering and technical forces of P&M working at or from a District or Local mine office, and supervisors such as mine foremen, assistant mine foremen, and such other supervisors as are in charge of any class of labor inside or outside of the mine and who perform no production work.

(b) Since 1988 and at all material times, the Union, by virtue of Section 9(a) of the Act, has been the designated exclusive collective-bargaining representative of the McKinley Mine unit.

6.(a) At all material times, the following employees who were employed at the Respondent's York Canyon Mine, herein called the York Canyon Mine unit, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All classified employees engaged in the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by the Employer, repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads and work of the type customarily related to all of the above; but excluding coal inspectors and weight bosses where employees are paid by the ton, watchmen, clerks, engineering and technical forces of the Employer, working at or from a district or local mine office, and supervisors such as mine foremen and assistant mine foremen who, in the performance of their duties may make examination for gas as prescribed by law and such other supervisors as are in charge of any class of labor inside or outside the mines and who perform no production work.

- (b) Since 1988, the Union, by virtue of Section 9(a) of the Act, was the designated exclusive collectivebargaining representative of the York Mine unit.
- 7. By discriminatorily modifying its Chevron Success Sharing plan in response to the Union's calling of memorial periods at the North River Mine, the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act by modifying the Chevron Success Sharing plan to require that employees forfeit bonuses in the event that the Union calls contractually sanctioned memorial days on other than a districtwide basis, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. In the event that the Respondent has withheld bonuses in response to the calling of memorial days pursuant to the collective-bargaining agreements then in effect, we shall order that the Respondent make employees whole for the amount of the bonuses, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The Respondent, Pittsburg & Midway Coal Mining Company, Englewood, Colorado, it officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Discriminatorily modifying its Chevron Success Sharing plan to require that employees forfeit bonuses if the Union calls contractually sanctioned memorial periods on less than a districtwide basis.
- (b) In any like or related manner interfering with, retraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.
- 2. Take the following affirmative actions necessary to effectuate the policies of the Act.
- (a) Rescind the discriminatory modification of its Chevron Success Sharing plan that requires employees to forfeit of bonuses in the event the Union calls memorial days on less than a districtwide basis.
- (b) Make employees whole for any lost bonuses occasioned by the implementation of the discriminatory modification of the Chevron Success Sharing plan, with interest.
- (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, records relating to the calculation and payment of the bonuses, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Within 14 days after service by the Region, post at its North River Mine in Alabama, Kemmerer Mine in Wyoming, McKinley Mine in New Mexico, and, if reopened, its York Canyon Mine in New Mexico, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (e) Within 14 days of service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the notice to all current employees and former employees employed by the Respondent at any time since February

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2005 at the former York Canyon Mine in New Mexico, and at any other mine involved in these proceedings if during their pendency the Respondent has gone out of business there or closed it.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 29, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily modify our Chevron Success Sharing plan to require that you forfeit bonuses if the Union calls contractually sanctioned memorial periods on less than a districtwide basis.

WE WILL NOT in any like or related manner interfere with, retrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act

WE WILL rescind the discriminatory modification to the Chevron Success Sharing plan.

WE WILL make you whole for any lost bonuses occasioned by our implementation of the discriminatory modification of the bonus plan, with interest.

THE PITTSBURG & MIDWAY COAL MINING COMPANY